

No. 15,926

IN THE
United States Court of Appeals
For the Ninth Circuit

ALFRED V. HAGEN,

Appellant,

VS.

CITY OF PALMER,

Appellee.

Appeal from the District Court for the
District of Alaska, Third Division.

BRIEF OF APPELLANT.

EDGAR PAUL BOYKO,
1155 Jones Street,
San Francisco 9, California,
Attorney for Appellant.

CHARLES E. TULIN,
BOYKO, TALBOT & TULIN,
Turnagain Arms Building,
Anchorage, Alaska,
Of Counsel.

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Appeal from the District Court for the
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BRIEF OF APPELLANT.

JURISDICTIONAL STATEMENT.

The District Court had jurisdiction of this case by virtue of the provisions of Sec. 16-1-70, Title 53, Chapter 2, and Title 69, Chapter 6, Alaska Compiled Laws Annotated, 1949, and 48 U.S.C. 101 and 193. This Court has jurisdiction by virtue of 28 U.S.C. 1291, which provides that the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, etc., except where a direct review may be had to the Supreme Court; and 48 U.S.C. 1294 which designates this

Court as the appropriate court for appeals from such judgments in the District Court for the District of Alaska.

STATEMENT OF THE CASE.

The appellant, Alfred V. Hagen, was charged in the municipal magistrate's court of the City of Palmer, Alaska, with wilful failure "to file a sales tax return for retail sales and services * * * performed during the month of August 1957, in violation of Section No. 6, Ordinance No. 40" of the City of Palmer (Record, pp. 3-7). His motions to quash the warrant of arrest and dismiss the complaint—on the ground that Ordinance No. 40 of the City of Palmer was invalid "as being without sanction of Territorial law" and that therefore the magistrate's court lacked jurisdiction—were denied (R., pp. 4, 9). A motion to disqualify the magistrate, on the ground that the said magistrate was also the city clerk of the City of Palmer, charged with the responsibility of making sales tax collections and therefore directly interested in the successful prosecution of the case, was likewise denied. (R., p. 8).

A trial was had before the magistrate who entered a verdict of guilty and sentence of conviction. Timely notice of appeal to the United States District Court for the District of Alaska, Third Division, was given (R., p. 4) and the cause transferred to that court for trial *de novo*, under the provisions of Sections 16-1-70 and 69-6-1 through 11, ACLA 1949. In the District Court, appellant filed his motion for a judgment of

acquittal (R., pp. 13-14) and in accordance with standard practice (*vide infra*), submitted a stipulation of facts in support of said motion, for the purpose of raising the legal issue of the validity of the ordinance under which he was convicted in the magistrate's court (R., pp. 14-16). Oral argument on this motion was had before the District Court by counsel for both sides and the matter was submitted (R., p. 46).

On December 31, 1957, the District Judge filed a memorandum opinion and order, denying the motion for judgment of acquittal (R., pp. 48-51) and, without further opportunity for hearing and without any additional evidence being adduced—with the exception of an affidavit theretofore filed by appellant (R., p. 47)—set the matter down for imposition of sentence. Accordingly, on January 6, 1958, the court pronounced sentence of imprisonment and a fine (R., pp. 51-52) and on January 7, 1958, there was entered a judgment of conviction (R., pp. 53-55). Notice of appeal to this Honorable Court was timely filed (R., p. 55).

STATEMENT OF THE FACTS.

On March 14, 1949, there was approved Chapter 38, Sessions Laws of the Territory of Alaska, 1949, being an act "to empower City Councils, pursuant to referendums, to levy sales taxes within their respective municipalities; and amending subsection Ninth of Sec. 16-1-35 ACLA 1949." The full text of this statute is set forth as Appendix A to this brief.

The statute just cited was amended in the 1951 Session of the Territorial Legislature, by the enactment of Chapter 47, SLA, 1951, approved March 21, 1951 and entitled "An act amending subsection Ninth of Sec. 16-1-31 ACLA 1949, as amended by Ch. 38, SLA 1949, pertaining to a general tax for school and municipal purposes." The full text of this statute is set forth as Appendix B to this brief. This act eliminated clause (b) of subsection Ninth—previously added by the 1949 statute cited above—which had contained authority to levy sales taxes pursuant to referendum. The repealing statute became effective June 21, 1951.

On July 10, 1951, the City Council of the City of Palmer conducted a sales tax referendum and more than 55 percent of the voters approving, there was enacted on August 8, 1951, Ordinance No. 10 of the City of Palmer, a sales tax ordinance, effective September 1, 1951 (R., pp. 33-45).

Representations on behalf of various municipalities were made to the 1953 Session of the Territorial Legislature, with respect to the aforementioned repeal of the municipal sales tax authority. These resulted in the enactment of Chapter 121, SLA 1953, approved March 30, 1953, effective immediately, which added a considerably revised,¹ new clause (b) to subsection Ninth, cited above, and added the following proviso:

¹Changes made are: Included rents as one of the subjects upon which the sales tax might be levied; decreased from 55% to a simple majority the vote necessary at a referendum; and added a provision to the effect that sales tax propositions shall not be presented to the voters more often than once a year.

“Section 2. All sales taxes heretofore levied and collected by municipalities within the Territory of Alaska, pursuant to ordinances which were valid at the time of their enactment, are hereby ratified and confirmed.”

The full text of this statute is set forth as Appendix C to this brief.

Acting under this authority, but *without referendum*, the City Council of the City of Palmer enacted a new sales tax ordinance, designated Ordinance No. 40, which repealed the previous Ordinance No. 10 and re-enacted, with some small changes, the provisions thereof, reciting the 1951 referendum. This new ordinance was passed and approved on December 22, 1953, effective January 1, 1954 (R., pp 16-31). It was amended by Ordinance No. 48, effective June 1, 1954, which increased the maximum penalties set forth in the sales tax ordinance² to a fine of \$300 and imprisonment for not more than thirty days, or both such fine and imprisonment (R., pp. 31-32). Thereafter, the City of Palmer proceeded to levy and collect sales taxes under this ordinance.

The appellant Alfred V. Hagen, is the owner and operator of a motion picture theater, known as the Valley Theater, in the City of Palmer (R., p. 6). He was a member of the City Council of that city when ordinances Nos. 10 and 40 were enacted and voted favorably thereon; he served as mayor of the City of Palmer from October 1952 until October 1953

²As well as all other municipal ordinances of the City of Palmer, No. 1 through No. 47, inclusive.

and was a member of the City Council of said city during August and September of 1956 (R., p. 49), the time of the alleged offense. On November 15, 1956, a sworn complaint was filed, by one Bernard R. Bouwens, chief of police of the City of Palmer, with the municipal court of said city, before L. C. Stock, municipal magistrate, who also serves as city clerk (charged with the duty of collecting sales taxes; R., p. 8). This complaint charged the appellant with "a misdemeanour, that of failure to file sales tax returns" and alleged that appellant "did wilfully fail to file a sales tax return for retail sales and service (*sic*) made and performed during the month of August 1956, in violation of Section No. 6, Ordinance No. 40" of the City of Palmer (R., pp. 6-7).

The magistrate thereupon issued a warrant of arrest and appellant was apprehended (R., pp. 5, 14). He was released and obtained counsel who thereafter filed the motions to disqualify the magistrate and to quash the warrant of arrest and dismiss the complaint, referred to above (*vide supra*, Statement of the Case, at p. 2 of this brief. There, followed the proceedings set forth in the foregoing Statement of the Case.³ From the resulting judgment of conviction in the District Court for the District of Alaska, without trial *de novo*, without trial by jury (the same not having been waived) and based only upon stipulated facts—submitted in support of a motion for judgment of ac-

³Evidence adduced before the magistrate indicated that appellant had filed his return and paid over the tax on November 15, 1956, the day the complaint was filed and warrant issued, but prior to service thereof (R., pp. 1, 4, 15, 49).

quittal and for the purpose of aiding the District Court in deciding an issue of law believed to be dispositive of the case (in accordance with standard practices of said court)—appellant has appealed.

ISSUES PRESENTED AND SPECIFICATIONS OF ERRORS.

1. Is Ordinance No. 40 of the City of Palmer, Alaska, void, as having been enacted without referendum, after repeal of a prior, similar Ordinance (No. 10), which provided for levy of a municipal sales tax, based upon a referendum, but without legislative sanction, the Territorial enabling act having been repealed before the holding of the referendum and the enactment of the first sales tax ordinance?

Appellant contends that since the 1951 referendum and ordinance were without legislative authority, both were void and the enactment, in 1953, of a new enabling statute, again requiring a referendum, conferred no authority upon the City Council of Palmer to enact a new sales tax ordinance, containing penal provisions, without another referendum. Accordingly, Ordinance No. 40 is void and neither the Municipal Court nor the District Court had jurisdiction to try and sentence the appellant herein. Hence the District Court erred in denying the motions for acquittal and entering judgment and sentence of fine and imprisonment thereon. The District Court also erred in refusing to pass on the validity of such ordinance on the theory that defendant (appellant herein) was "estopped" to deny the validity of the ordinance. (*sic!* R., pp. 50, 51, 57).

2. Is the judgment of conviction invalid upon the face of the record because of a fatal variance with the complaint or information upon which it is based and because it is wholly unsupported by the stipulated (and only) facts in this case?

Appellant contends that he was accused in the information (styled a "complaint" under local practice) of *wilful failure to file a sales tax return for August 1956*, yet the memorandum opinion, filed *in lieu* of findings of fact and conclusions of law in support of the judgment, as well as the stipulated (and *only*) facts of the case, show that appellant *did* file such return and paid over the tax moneys collected, albeit tardily. Moreover, there is *no evidence whatsoever* in the record indicating that appellant acted wilfully or intentionally. Hence, the District Court erred in finding appellant "guilty as charged" (R., p. 54) and entering judgment thereon.

3. Was appellant deprived of "due process" of law when the District Court, after hearing a motion for judgment of acquittal, submitted upon stipulated facts, denied the same and proceeded, summarily, to find appellant guilty, pronounce sentence and enter judgment, without further trial or hearing of any kind, and without the aid of a jury?

Appellant contends that when the District Court had ruled on the motion to acquit, based upon stipulated facts, such stipulation had fully performed its purpose and appellant, not having waived the same, was entitled to trial by jury under the provisions of Secs. 66-12-1 and 2, ACLA 1949. Hence the District Court erred in proceeding, summarily, to find appellant guilty, pronounce sentence of fine and imprisonment and enter judgment thereon.

ARGUMENT.

I.

SALES TAX ORDINANCE NO. 40 OF THE CITY OF PALMER, ALASKA, HAVING BEEN ENACTED WITHOUT REFERENDUM, AFTER REPEAL OF A PRIOR, SIMILAR ORDINANCE (NO. 10), BASED UPON A REFERENDUM HELD WITHOUT LEGISLATIVE SANCTION, IS VOID, BECAUSE THE 1949 TERRITORIAL ENABLING ACT AUTHORIZING CITIES TO LEVY A SALES TAX WAS REPEALED IN 1951 BEFORE THE HOLDING OF THE REFERENDUM AND THE ENACTMENT OF THE FIRST SALES TAX ORDINANCE AND THE NEW (1953) ENABLING ACT, UPON WHICH SUCH ORDINANCE NO. 40 WAS BASED, AGAIN REQUIRED THE HOLDING OF A REFERENDUM, WHICH WAS NOT DONE.

Municipal corporations of the Territory of Alaska have only such powers of government as are expressly granted to them, or such as are necessary to carry into effect those that are granted. Where there is doubt as to whether or not such a municipality has been granted a power which it claims, such doubt is to be resolved against the use of such power by the municipality.

Valentine v. Robertson, (CCA 9th, 1924), 300 F. 521;

In re Bruno Munro, (1901), 1 Alaska 279;

Ketchikan Co. v. Citizens' Co., (1903), 2 Alaska 120, 128, 129;

Conrad v. Miller, (1905), 2 Alaska 433, 437;

Fairbanks v. Independent Meat Market, (1910), 4 Alaska 147;

Ballaine v. Seward, (1917), 5 Alaska 734, 739;

Cochran v. Nome, (1944), 10 Alaska 425, 434, 435;

See also, as to municipalities generally, the following:

Los Angeles v. Gurdane, (CCA 9th, 1932), 59 F.2d 161, 165;

Milwaukee v. Meyer, (Wis., 1929), 224 N.W. 106, 108;

Earusso v. East Hanover, (N.J., 1936), 182 Atl. 617;

Ex parte Davis, (Okla., 1941), 114 P.2d 186.

Accordingly, any authority which the City of Palmer, a city of the first class and a municipal corporation of the Territory of Alaska, ever possessed, to provide, by ordinance, for the levy and collection of consumer's sales taxes and to provide for enforcement thereof by criminal sanctions, must be found in specific delegations from the Congress or the Territorial Legislature. Prior to the enactment of Chapter 33, SLA 1949, none of the cities in Alaska possessed such powers. The enactment of the 1949 statute (Appendix A), conferred this right but provided as a condition precedent "that the consent of the qualified voters of the municipality is first obtained through a referendum vote at a general or special election * * *".

Based upon this authority, enacted into law over considerable opposition, various Alaskan municipalities proceeded to hold sales tax referenda and to enact sales tax ordinances. It is a matter of public record that there existed a large body of public opinion in the Territory of Alaska, dissatisfied with the law and claiming that its provisions led to irresponsibility and waste in municipal government. It is

conjectural whether or not this public pressure led to the enactment, in the next succeeding session of the territorial legislature, of Chapter 47, SLA 1951 (Appendix B). This act, nonetheless, specifically purported to amend the 1949 statute (Appendix A) "*to read as follows*": (there follows re-enactment—with certain changes—of clause (a), which provides for a general tax for school and municipal purposes, but clause (b), which had been added by the 1949 statute and which contained the sales tax authority is eliminated). A very strong indication of the legislative intent is found, moreover, in the fact that clause (a) of subsection Ninth was concurrently amended so as to *increase* the maximum level of the general property tax to not to exceed *three* percentum of the assessed valuation, from the two percent limit contained in the 1949 statute, presumably to compensate for the revenue loss occasioned by the implied repeal of the sales tax authority.

It is also a matter of public record that considerable confusion resulted from this method of accomplishing repeal of the sales tax and that many Alaskan cities continued to collect sales taxes in the belief that no repeal had been intended. This controversy was again carried to the 1953 Session of the Territorial Legislature, where the conflict was resolved in favor of strong municipal importuning for re-enactment of sales tax authority, resulting in the passage of Chapter 121 SLA 1953 (Appendix C). Recognizing moreover, that those cities which had continued to collect sales taxes would be financially embarrassed if they were required to refund the same, the legislature

enacted Section 2 of the Chapter just cited, which provided that “all *sales taxes heretofore levied and collected* by municipalities within the Territory of Alaska, *pursuant to ordinances which were valid at the time of their enactment*, are hereby ratified and confirmed.” (Italics supplied).

This very limited validation clause, which purports to validate only the interim levy and collection of sales taxes pursuant to ordinances *valid at the time of their enactment*, is sharply contrasted with another validation clause, enacted at the same session of the legislature, *before* the last mentioned Chapter, to take care of a similar situation affecting cities of the *second* class. In that case, because of confusion created by ambiguous statutory language, the councils of some of the cities of the second class of the Territory of Alaska had assumed that the 1949 enabling statute had conferred upon them, as well as upon cities of the first class, authority to enact sales tax ordinances and to levy sales taxes pursuant thereto. They proceeded to do so and when their authority was challenged, appealed to the 1953 legislature, which came to the rescue by enacting chapter 92, SLA 1953 (approved March 28, 1953), conferring authority to levy sales taxes upon cities of the second class. It contains the following validation clause:

“*All sales tax ordinances, otherwise valid, which have been enacted by cities of the second class prior to the effective date of the act under the provisions of subsection (b) of Chapter 38, Session Laws of Alaska 1949, are hereby validated and confirmed. * * **” (Italics supplied).

When the two statutes just cited—which are *in pari materia*—are read together, the conclusion is inescapable that the 1953 legislature intended to accomplish the following things:

1. To restore to cities of the first class the power to levy consumers' sales taxes.

2. To validate and confirm the collection of sales taxes made by cities of the first class during the interim following the repeal, but only pursuant to ordinances "valid at the time of their enactment" (*i.e.*, enacted pursuant to referendum and prior to repeal), so as to prevent the necessity of refunds in those cases.⁴

3. To give cities of the second class authority, for the first time, to levy consumers' sales taxes; and

4. To validate, retroactively, sales tax ordinances of cities of the second class, otherwise valid (*i.e.*, duly enacted pursuant to referendum and with proper observance of procedural requirements) prior to the effective date of the enabling act, in mistaken reliance upon the statute conferring such authority upon cities of the first class.

Clearly absent, and indeed negated, is the indication of any intent to validate sales tax *ordinances* enacted by cities of the *first* class during the period of repeal, from June 21, 1951 to March 30, 1953. Yet it was precisely in this period, namely, on July

⁴Indicating recognition of the rule that repeal of the enabling act, without saving clause, carries with it all ordinances enacted thereunder (*vide infra*).

10, 1951, that the Palmer sales tax referendum was held, and on August 8, 1951, that the Palmer sales tax ordinance (No. 10) was passed. Undoubtedly, it was in clear recognition of the invalidity of this ordinance, that the City Council of Palmer, on June 1, 1954, repealed the invalid Ordinance No. 10 and attempted to enact a new sales tax ordinance, based upon the 1953 statute. No compliance, however, was made with the new statute's requirement that a referendum be held, but reliance was had upon the old, invalid (because not sanctioned by law) referendum of 1951. It is not unreasonable to presume that one of the reasons was a considerable doubt in the mind of the city fathers whether such a referendum would again pass, after the citizenry had several years experience with the administration of the Palmer sales tax measure. Whatever the reasons, however, compliance was not had with the condition precedent expressly stipulated in the 1953 enabling act and since the validating clause of that statute makes it perfectly clear that the legislature did not intend to revive the old (1949) statute, the attempt to "tack" the invalid referendum unto the enactment of the new ordinance clearly makes the latter invalid, as lacking the consent of the voters which the statute demands before the authority may be exercised.⁵

⁵If the 1953 act had merely reinstated the language repealed in 1951, it might be argued perhaps that the consent given by the 1951 referendum was carried forward. However, as has been shown, the 1953 sales tax authority contained important changes, such as the inclusion of rents (see footnote 1, on page 4, *supra*).

It is, of course, an elementary proposition of municipal law, that where a general statute prescribes the form and manner of adopting ordinances, compliance with the statutory requirements is essential to the validity of the ordinance.

Genkinger v. City of New Castle, (Pa., 1951), 84 Atl. 2d 303, 304;

Jack v. Torrant, (Conn., 1950), 71 Atl. 2d 705, 708 (failure to comply with procedural requirement of enabling act);

Liberty Nat'l Bank of Chicago v. Metrick, (Ill., 1951), 102 N.E. 2d 308, 310 (ordinance held a nullity where non-compliance with style requirement apparent on its face);

Bruno v. Shrewsbury, (N.J.L., 1949), 65 Atl. 2d 131;

Reimer v. Holyoke, (Colo., 1933), 27 P. 2d 1032, 1034 (failure to conform to required format);

City of Glens Falls v. Standard Oil Co., (N.Y. Misc., 1926), 215 N.Y.S. 354;

Sessinghaus v. Central Paving & Construction Co., (Mo., 1922), 296 S.W. 1034 (compliance with preliminary steps before enactment, as required by charter, held: jurisdictional);

Tennent v. Seattle, (Wash., 1914), 145 P. 83 (failure to comply with charter requirements as to enactment procedure);

Elliott v. Monongahela City, (Pa., 1911), 79 Atl. 144 (failure to comply with prescribed enactment procedures).

Accord:

Cooper v. Valley Head, (Ala., 1924), 101 So. 874, 877 (failure to comply with required procedure; ordinance upheld on other grounds).

Since Ordinance No. 40 of the City of Palmer thus obviously does not comply with the express requirements of the 1953 enabling act, it must be deemed invalid, unless it may be upheld on either one of two possible theories. First, that the 1951 statute (Appendix B) did not repeal the 1949 enabling act (Appendix A) or, second, that the 1953 act (Appendix C) revived and validated, retroactively, the authority granted in 1949 and repealed in 1951, thus saving the 1951 referendum and ordinance of the City of Palmer.

Appellant contends that since this is a penal ordinance and since he is to be deprived of liberty and property thereunder, the city is not entitled to the various liberal presumptions of validity and rules of construction often accorded to remedial or beneficial municipal legislation. It is, of course, axiomatic that penal ordinances, like other penal laws, are strictly construed and that all doubts are resolved in favor of the defendant as against the public authority.⁶

As a municipal ordinance draws its authority from a statutory enactment, the withdrawal of the author-

⁶See, e.g., annotation in 17 Ann. Cas. 212 (and cases there cited); and see, generally, as to penal statutes: *McBoyle v. United States*, (1931), 285 U.S. 25, 51 S.Ct. 340, 75 L.ed. 816; *Kordel v. United States*, (1948), 335 U.S. 345, 69 S.Ct. 106, 93 L.ed. 52; *Smitkin v. United States*, (CCA 7th, 1920), 265 F. 489, 494.

ity of the enactment by specific provision or by implication from subsequent legislation upon the subject matter operates to repeal any ordinance which was dependent upon the repealed statute for its existence. Likewise, an ordinance which precedes the enactment of a conflicting statute is repealed upon the promulgation of that statute. It follows, without need for extended argument, that an ordinance passed after repeal of the enabling act must be a nullity.

1 McQuillin on Municipal Corporations, (3rd ed.), Sec. 21.43;

Richards v. Wheeler, (Cal. App., 1935), 51 P. 2d 436, 439;

Luse v. Dallas, (Tex. App., 1939), 131 S.W. 2d 1079, 1084.

Under the common law rules of construction and interpretation, the repeal of a penal statute operates to efface the act from the statute books as though it had never existed. The repeal operates to terminate any prosecution which has not proceeded to a final judgment and grants immunity from prosecution or indictment under the act for offenses committed while the act was in operative existence.

See, e.g., *Norris v. Crocker*, (1871), 13 How. (U.S.) 429, 438, 14 L.ed. 210, 213;

Keller v. State, (Md., 1858), 71 Am. Dec. 596.

While many jurisdictions, including Alaska, have enacted general saving statutes with the express purpose of achieving a continuance of the repealed statute in respect to past activity and pending legal actions, municipal ordinances are not within the pur-

view of general saving statutes. Therefore the repeal of an ordinance is a bar to a prosecution under it.⁷

Moore v. Ashton, (Ida., 1922), 211 P. 1082, 32 ALR 1512;

Leach v. Kenyon, (N.Y., 1933), 261 N.Y.S. 676;

Rutherford v. Swink, (Tenn., 1895), 35 S.W. 554.

We come now to consider the effect of the amendatory act of 1951 (Appendix B). Because it is defined as an act that changes an existing statute, the courts have declared that the mere fact that the legislature enacts an amendment indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing one. Therefore any material change in the language of the original act is presumed to indicate a change in legal rights.

People v. Weitzell, (Cal., 1927), 255 P. 792, 52 ALR 811;

McLaren v. State, (Tex., 1917), 199 S.W. 811, 812.

To determine what effect or defects in the original act the legislature intended to remedy, the original act must be compared with the amendment. Those provisions of the original act which are in irreconcilable conflict with the provisions of the amendatory act are impliedly repealed. When the amendatory act purports to set out the original act or sections *as amended*, all matter in the act or section that is

⁷Note that the repealed statute carried no penalty provisions. Such penal sanctions as were provided were contained in the municipal ordinance.

omitted in the amendment is considered repealed. The intent of the legislature to set out the original act or section as amended (and to omit portions not repeated), is most commonly indicated by a statement in the amendatory act that the original law is amended "to read as follows". This is the language used in the amendatory statute involved in the case at bar. By its use, the legislature has declared that the new statute is a substitute for the original act. Only those provisions of the original act which are repeated in the amendment are retained.

United States v. One Icebox, (DC ND Ill., 1930), 37 F. 2d 120, 123;

Mitchell v. Walden Motor Co., (Ala., 1937), 177 So. 151, 153;

Brockman v. Board of Directors, (Ark., 1934), 66 S.W. 2d 619;

Ashton Motor Car Co., v. Mannion, (Conn., 1918), 103 Atl. 655;

Simborski v. Wheeler, (Conn. 1936), 183 Atl. 688, 690;

State ex rel. McQuaid v. Duval County, (Fla., 1887), 3 So. 193, 204;

Chicago v. Jewish Consumptives' Relief Society, (Ill., 1926), 154 N.E. 117, 118;

Smith v. State, (Ind., 1924), 144 N.E. 471, 472;

State ex rel. Nicely v. Wildey, (Ind., 1935), 197 N.E. 844, 846;

Grieb v. Jefferson County Fiscal Court, (Ky., 1933), 61 S.W. 2d 285, 286;

People v. Lowell, (Mich., 1930), 230 N.W. 202;

- Mannheimer Bros. v. Kansas City Casualty & Surety Co.*, (Minn., 1920), 180 N.W. 229, 230;
- Bell v. State*, (Miss., 1918), 79 So. 85;
- Belfast Inv. Co. v. Curry*, (Mo., 1915), 175 S.W. 201, 204, 205;
- Continental Oil Co., v. Montana Concrete Co.*, (Mont., 1922), 207 P. 116, 118;
- McDermott v. Nassau Electric R. Co.*, (N.Y., 1895), 32 N.Y.S. 884;
- State ex rel. Durr v. Spiegel*, (Ohio, 1914), 109 N.E. 523;
- Texas Farm Bureau Cotton Ass'n v. Lennox*, (Tex., 1927), 296 S.W. 325, 327;
- Bierer v. Blurock*, (Wash., 1894), 36 P. 975, 976;
- Thom v. Sensenbrenner*, (Wis., 1933), 247 N. W. 870, 871;
- Rouw Co., v. Crivella*, (CCA 8th, 1939), 105 F. 2d 434, 437.

Thus, when the Territorial Legislature enacted the 1951 statute (Appendix B), stating specifically that it was amending the 1949 statute (Appendix A) so as "to read as follows" and omitted subsection (b) which contained the municipal sales tax authority, the latter, under the rule of the cases just cited, was repealed by clear implication.⁸

⁸If there was ever any doubt as to the legislative intent to effect a repeal by the 1951 amendment (Appendix B), such doubt was resolved when the 1953 Session enacted the validation clause set forth at page 5, *supra*. Had there been no repeal, no validation was necessary.

Some courts have said that repeals by implication are not favored and that there is a presumption of a contrary legislative intendment. This view has been criticized by Mr. J. G. Sutherland, the eminent authority on the law of statutes and statutory construction, who writes in his standard treatise, as follows:

“Legislation may serve a dual purpose, either to restate or repeal the existing law. With regard to existing and older legislation it is, perhaps, not uncommon for new legislation to have as its principal or sole purpose the restatement of existing law for purposes of clarity and uniformity. But unquestionably, the motive behind the great bulk of new legislation is to change in one way or another, the existing law, including both common law and legislation. The exact extent to which existing legislation is repealed by later legislation, in the absence of provision expressly specifying the intended repeal, is subject to extreme variations that are dependent upon the subject matter of the new statute.

“The rule that a repeal by implication will not be presumed places the emphasis upon the older, and, perhaps, more firmly established policy to be found in previous legislation. It must be conceded that an understanding of the pre-existing legislation provides one of the most valuable aids in determining the purposes of the new legislation, and in adapting the new law into the existing scheme of jurisprudence under the doctrine that statutes will be interpreted *in pari materia*.

“But the underlying theory behind the legislative process is that it is through the legislature and Congress that the current public demands

resulting from changing social, economic and political conditions are enabled to find expression.

“Since it is from the subject matter of new legislation that the extent of a repeal is to be sought, it is submitted that the presumption against implied repeal often serves as a cumbersome method for determining legislative intent, which in many cases produces unsatisfactory results. Instead, the emphasis in the first instance belongs upon the purposes and objects behind the expression of the new statute with fair consideration to surrounding conditions and former legislation.”

1 Sutherland on Statutes and Statutory Construction, (3rd ed.), Sec. 2016 (and cases there cited).

It is submitted that, applying these tests to the legislation with which the case at bar is concerned, it is quite apparent that the legislature in 1951, giving way to public criticism of the controversial municipal sales tax statute, attempted to revamp that portion of the general statute enumerating the powers of cities of the first class which deals with the power to tax, by dropping from it the portion relating to authority to levy consumers' sales taxes, which it had so recently added, and increasing, as a compensatory measure, the statutory limit upon *ad valorem* property taxes which such cities were empowered to levy. To resolve any doubt, moreover, enactment of the validation section of the 1953 statute (Appendix C), gave clear legislative recognition to the fact that the 1951 amendment (Appendix B) did indeed constitute

a repeal of the sales tax authority. Otherwise the validation clause would be meaningless.⁹

We have thus seen that the authority granted (in 1949) to cities of the first class in the Territory of Alaska to levy sales taxes (based upon certain conditions), was indeed repealed by the next succeeding legislature in 1951. What then was the effect of its re-enactment in 1953?

Generally speaking, the re-enactment of a statute is a continuation of the law as it existed prior to the re-enactment insofar as the original provisions are repeated without change in the re-enactment. Consequently, an intermediate statute which has been superimposed upon the original enactment as a modification of its provisions is likewise not repealed by a re-enactment of the original statute, but is construed as being continued in force to modify the re-enacted statute in the same manner that it did the original enactment. However, this immunity from repeal is extended only to those provisions of intermediate acts which are consistent with the re-enactment, and therefore, any provisions in the intermediate act which are inconsistent with the re-enactment are repealed.

See:

- 1 Sutherland on Statutes and Statutory Construction, (3rd ed.), Sec. 2036.

Here, however, the intermediate act repealed the original act and the re-enactment, therefore, effected

⁹The presumption, of course, is in favor of a meaningful, as opposed to a futile or superfluous legislative act. See: 2 Sutherland on Statutes and Statutory Construction, (3rd ed.), Sec. 4510 (and cases there cited).

a continuation (with modifications) of clause (a) of subsection Ninth—relating to the *general* taxing powers of municipal corporations—as contained in both the 1949 and 1951 statutes. As to clause (b), however, which related to the sales tax powers, that proviso had been wiped off the books in 1951, and hence to that extent the 1953 act repealed the 1951 statute and created a new statutory power of prospective application. Needless to say, to the extent that it might be considered to have revived the penal provisions of any ordinance under which a criminal prosecution might be brought, it was *required* to be of *prospective* rather than retroactive application, to avoid the fatal constitutional defect of an *ex post facto* criminal statute.

Constitution of the United States, Article I,
Secs. 9 and 10;

Calder v. Bull, (1798), 3 U.S. 386, 1 L. ed. 648;

United States v. Stafoff, (1923), 260 U.S. 477,
480, 43 S. Ct. 197, 67 L. ed. 358;

State v. Williams, (N.C., 1887), 2 S.E. 55, 56;

Moore v. State, (N.J., 1881), 39 Am. Rep. 558.

In the present case, moreover, the legislature, in enacting the validation clause cited above (at p. 5 of this brief) clearly indicated its intent that the enabling authority which conferred upon municipalities the right to enact such ordinances was intended to be prospective only from the date of re-enactment, by singling out for validation only those “sales taxes heretofore levied and collected by municipalities * * * pursuant to ordinances which were valid at the time of their enactment”. The strikingly contrasting man-

ner of validating the *enactment of sales tax ordinances* by cities of the second class, effected by the same session of the legislature, has been pointed out before (*vide supra*, at p. 12 of this brief).

Clearly, therefore, had the legislature intended to validate *ordinances enacted* (as distinguished from sales taxes collected) by cities of the first class during the interim of the repeal, it would have used the language employed by it in the statute just previously enacted with reference to cities of the second class. That it did *not* do so, indicates a clear intent to the contrary, and if there were any ambiguity involved, it must obviously be resolved in favor of a defendant in a criminal prosecution who is entitled to fair warning, in advance, of the scope and effect of a penal statute. Moreover, it is well settled that an ordinance void under a statute existing at the time of its enactment is not validated by an amendment of the statute so that the ordinance might be validly enacted under the amended law.

McGillic v. Corby, (Mont., 1908), 95 P. 1063, 1064, 17 LRA (NS) 1263.

Also, it has been held that a statute passed subsequent to the enactment of an invalid ordinance purporting to empower the common council to enforce any regulation, contract, or law theretofore made upon the subject with which the ordinance deals, but not naming the particular ordinance in question, is not in itself a confirmation of the ordinance so as to validate it.

Chicago v. Rumpff, (Ill., 1867), 92 Am. Dec. 196, 202.

Of course, the law here in question does not purport to go nearly that far, but on the contrary specifies quite clearly a far more limited validation, applicable to the fruits of those ordinances only which were enacted prior to repeal (*vide supra*).

Admittedly, there are here presented extremely nice problems of statutory interpretation, which might be considered as involving a close question, but for the criminal nature of the proceedings and the overriding considerations, firmly embedded in the Anglo-American system of jurisprudence, of protecting the accused and resolving such doubts in his favor.

The trial judge below, however, was not troubled by such problems of statutory construction and interpretation. He sliced through the Gordian knot in one deft stroke, by application of the entirely novel theory that a person subject to criminal prosecution for alleged failure to make a tax return, is "estopped" from questioning the validity or constitutionality of the penal statute under which he is to be jailed, if he has made partial or imperfect compliance, such as here, by collecting the tax and making a tardy return and payment. Apparently, this unorthodox doctrine was suggested to the trial court below by the prosecuting attorney who contended, successfully, that this was "the real issue" in this case.¹⁰

¹⁰"The Court: Mr. Hagen, will you please come forward with your counsel. Motion for judgment of acquittal is denied. I feel that Mr. Plummer has pointed out the real issue, he felt that if Mr. Hagen wanted to test the constitutionality of the statute he would have refused to have collected everything (*sic*); having once collected it I feel you are not in position (*sic*) to raise that issue at this time." (R., p. 57).

The following portion of the memorandum opinion filed by the trial court below, summarizes this theory and at the same time epitomizes the nature and extent of the error into which the trial judge appears to have fallen:

“I am of the opinion and hereby find that it is not necessary for the court to determine the validity of the original or amendatory statutes or the ordinances here in question, for the reason that the defendant collected said taxes in question and, therefore, now is precluded from challenging the constitutionality of such statutes. When the defendant collected the taxes he became the agent of the city of Palmer and as such is obligated to account to the city, as principal, for the amount thereof, and as a collector, he cannot now deny the right of his principal to receive such, on the ground that the tax was illegally levied. This is a well established principle of the law (citations). The same result is often justified on grounds of estoppel (citation), constructive trust or other equitable grounds (citations). * * *” (R., pp. 50, 51).

An examination of the authorities cited by the District Judge in this opinion quickly shows that the foregoing misstatement of the law is due to a confusion of the rules applicable to the jurisdictional issue of the validity of a statute or ordinance under which a criminal prosecution is brought, with certain equitable principles which form the basis of denying certain defenses in civil cases. Thus, apart from a reference to a text on the law of agency, the relevancy of which is not readily apparent, the opinion relies on

these cases (R., p. 51): *Village of Olean v. King*, (N.Y., 1889), 22 N.E. 559; *Collins v. Tillou*, (Conn., 1857), 68 Am. Dec. 398; and *Murdock v. Cincinnati*, (CC SD Ohio, 1891), 44 F. 726.

If the author of the opinion below had chanced to read these cases, or even their syllabus, he might have been startled to discover the following:

Village of Olean v. King, (*supra*), was a civil action against an official tax collector and the sureties on his bond. The collector had failed to pay over taxes which he had received in his official capacity and when sued by the city resisted the action on the ground, among others, that the tax was invalid and therefore should not have been levied in the first place. The court held that

“While a tax collector may decline to proceed in the collection of a tax illegally levied, as any person may refuse to recognize any illegal authority, or to obey an unconstitutional law, *he may do so only for his own protection*. Having collected a tax, he cannot then question the right of the proper authority to receive it, but must pay it over. * * * He can constitute himself judge of the validity of the tax *for his own protection only*. * * *” (Italics supplied).

loc. cit., at p. 561.

Collins v. Tillou (*supra*), involves an appeal from a judgment in favor of a claimant against the insolvent estate of his agent, to whom he had given a deed to land previously forfeited for non-payment of taxes, for the purpose of enabling such agent, in behalf of his principal, to seek the recovery of such

land on the ground that the tax sale was invalid. The agent compromised the claim to the land with the purchaser under the tax sale and thereafter failed to account to his principal for the proceeds. On appeal from a judgment in favor of the plaintiff it was contended by the representatives of the agent, since deceased, that as the principal did not have good title when he conveyed to the agent, he should not be allowed to recover. It was *held, inter alia*,¹¹ that the agent cannot now deny the title of his principal. The court said:

“He was willing to accept the agency and sell the land; and now for the agent *to retain the money* on such ground is unconscionable and in violation of long established principles of law.” (Italics supplied).

loc. cit., at p. 399.

Finally, *Murdock v. Cincinnati*, (*supra*), involved an action to enjoin a municipality from collecting or enforcing certain assessments for street improvements. The plaintiff claimed that while assessments were authorized by law, the law was void as wanting in “due process of law”, because there was no notice or opportunity to be heard. It was *held* that since the plaintiff in this case had himself petitioned the municipality to make the improvements and to assess his property therefor, he was thereafter estopped from impeaching or denying the assessment or at least he may be deemed to have waived the procedural requirements of notice, the court saying “proceedings,

¹¹The case turns mainly on a question of parol evidence.

whether *ex parte* or adversary, which result in the taking or depriving a person of his private property, are not wanting in 'due process of law' if such person has, in advance, consented to the same. His request that they should be had is the equivalent of notice, or a waiver thereof."

loc. cit., at p. 728.

It was further held in that case that a proceeding which was then pending in the state courts on the non-federal aspects of the case would afford the complainant the opportunity to be heard to which he claimed to be entitled.

Obviously these cases, upon the purported authority of which the trial court saw fit to deprive the appellant of his liberty are not even remotely related to the issues presented by the case at bar. This is not a case involving the right of this appellant to retain monies collected by him for the municipality under a claim that it is not entitled to receive them by virtue of the invalidity of the enabling ordinance. Here the defendant has paid over the money and is raising the question of the validity of the ordinance as a defense to a criminal prosecution for its alleged violation.¹² In this context, the issue of whether the ordinance is valid or not is not collateral, but is *jurisdictional*. Therefore the defendant can neither be deemed to be estopped from raising the point nor to have waived the defense or to have consented to the exercise of

¹²The point that his actions in collecting and paying over the tax, under pain of criminal sanctions, do not constitute any "waiver" of his rights, or "consent" to incarceration, seems too obvious to be belabored.

criminal jurisdiction under the void statute. Jurisdiction of the subject matter of a crime is derived from the law. It can never be acquired solely by the consent of the accused. Objection that the court has not jurisdiction of the subject matter may be made at any stage of the proceedings, and the right to make such objection is never waived.

See:

Annotation in 25 Am. Rep. 540, 541;

and see also:

Kelly v. Meyers, (Ore., 1928), 263 P. 903, 905;
56 ALR 661.

It is elementary that an invalid or unconstitutional statute or law is no law at all and that any judgment of conviction had pursuant to such statute is void as were the proceedings which led to it.

Osborn v. Bank of U. S., (1824), 22 U.S. 739,
6 L. ed. 204;

Daniels v. Tearney, (1880), 102 U.S. 415, 26
L. ed. 187;

Rodgers v. Mabelvale Ext. Rd. Imp. Dist. No. 5,
(CCA 8th, 1939), 103 F. 2d 844, 846;

In re Rahrer, (CC Kan., 1890), 43 F. 556, 558,
559;

Hubbard v. Lowe, (DC N.Y. 1915), 226 F. 135,
141.

II.

THE JUDGMENT OF CONVICTION HERE APPEALED FROM IS INVALID UPON THE FACE OF THE RECORD, BECAUSE OF A FATAL VARIANCE WITH THE COMPLAINT OR INFORMATION UPON WHICH IT IS BASED AND BECAUSE IT IS WHOLLY UNSUPPORTED BY THE STIPULATED (AND ONLY) FACTS IN THIS CASE.

The information (styled a "complaint" under local practice) in this case accused the appellant of a misdemeanor in these words: "The said Alfred V. Hagen, d/b/a Valley Theater in the City of Palmer, Alaska, and within the jurisdiction of this Court, did, wilfully, fail to file a sales tax return for retail sales and service (*sic*) made and performed during the month of August, 1956, in violation of Section No. 6, Ordinance No. 40, and contrary to said Ordinance of the said City of Palmer, * * *" (R., pp. 5, 6).

The record shows that not only is there no evidence whatsoever of any wilful or intentional failure to file such return, but on the contrary, the stipulated (and only) facts show that indeed such a return was made and the money paid over, albeit tardily, on November 15, 1956, the date on which the complaint was filed and (presumably) before it and the warrant of arrest issued thereon were served (R., pp. 4, 15, 49). The memorandum opinion, filed herein in lieu of findings of fact and conclusions of law adopts these facts. Yet, the judgment recites that the defendant (appellant herein) "has been *convicted of the offense as charged in the complaint*" and that "it is adjudged that the defendant is *guilty as charged*" (R., p. 54; italics supplied).

Giving these words their plain and ordinary meaning, it follows that it was the judgment of the trial court that the defendant was convicted and found guilty of "wilfully failing to file a sales tax return for retail sales and services made and performed during the month of August, 1956". Obviously, the record not only fails to support such a judgment, but patently contradicts it.

The law on the subject admits of little argument. The indictment or information in a criminal prosecution necessarily confines the government to the charge made against the defendant, in order that the defendant shall know, as the Constitution provides, "the nature of the accusation against him."¹³ The defendant can be tried only on the charge contained in the indictment or information and not for any other offense.

Clyatt v. United States, (1904), 197 U.S. 207, 222, 25 S. Ct. 429, 49 L. ed. 726, 731;

Wright v. People, (Colo., 1939), 91 P. 2d 499, 502, 123 ALR 474;

State v. Coomer, (Vt., 1933), 163 Atl. 585, 587, 94 ALR 1038;

And see also: Annotation in 24 ALR 1142.

Likewise, a person cannot be convicted of an entirely different offense from that charged or necessarily

¹³Article VI of the Amendments to the Constitution of the United States.

included within the terms of the indictment or information.

The Hoppet v. United States, (1813), 7 Cransh. 389, 394, 3 L. ed. 380, 382 (*per* Marshall, Ch. J);

People v. Grogan, (N.Y., 1932), 183 N.E. 273, 275, 277, 86 ALR 1266.

It is thus quite apparent upon the face of the record, that a fatal variance exists between the complaint or information and the judgment on the one hand, and the facts as stipulated and found by the court on the other. For this reason alone the judgment should be set aside.

III.

WHEN THE DISTRICT COURT, AFTER HEARING A MOTION FOR JUDGMENT OF ACQUITTAL, SUBMITTED UPON STIPULATED FACTS, DENIED THE SAME AND THEREAFTER PROCEEDED, SUMMARILY, TO FIND APPELLANT GUILTY, PRONOUNCE SENTENCE AND ENTER JUDGMENT, WITHOUT FURTHER TRIAL OR HEARING OF ANY KIND, AND WITHOUT THE AID OF A JURY, CONTRARY TO THE MANDATORY PROVISIONS OF ALASKA LAW, THE APPELLANT WAS THEREBY DEPRIVED OF "DUE PROCESS" OF LAW IN A CRIMINAL PROCEEDING IN WHICH HIS LIBERTY AND PROPERTY ARE IN JEOPARDY.

Section 16-1-70, ACLA 1949, provides for appeals to the District Court for the District of Alaska from judgments of the municipal courts of cities of the first class in the Territory of Alaska. The procedure followed upon such appeal is outlined in Sections 69-6-1 through 11, ACLA 1949. Accordingly, the case is

tried *de novo* as if originally initiated in the District Court. The trial *de novo* in that court is an exercise of original jurisdiction.

United States v. Smith, (1922), 6 Alaska 472, 475;

Application of Jorge, (1945), 10 Alaska 633, 639.

While there is no provision for jury trials in the municipal courts of the Territory of Alaska, the right to a trial by jury is expressly and unequivocally preserved in all criminal cases tried in the District Court, by Sections 66-13-1 and 2, ACLA 1949, which apply to all proceedings for the punishment and prevention of crimes in the Territory of Alaska, except as superseded by the Federal Rules of Criminal Procedure. The sections of the Territorial Code, just cited, read as follows:

“Sec. 66-13-1. When issues of fact arise. That an issue of fact arises—

1. Upon a plea of not guilty; or,
2. Upon a plea of former conviction or acquittal of the same crime.

“Sec. 66-13-2. How issues tried. That an issue of law *must be tried* by the court, and an issue of fact *by jury*, of the political division in which the action is triable.” (Italics supplied.)

While it may be contended that the crime in question is a petty offense within the meaning of applicable federal statutes and rules of procedure, yet even under Rule 23(a) of the Federal Rules of Criminal

Procedure it has been held that all offenses, even petty offenses, must be tried by a jury, in the absence of statutory provisions for trial without a jury. *A fortiori*, a jury trial is mandatory where statutory provisions require it in all criminal prosecutions, such as is the case under the Territorial statutes cited above.

United States v. Great Eastern Lines, (DC ED Va., 1950), 89 F. Supp. 839.

It is clear, therefore, that trial of the issues of fact in the present case by a jury was mandatory in view of the use of the word "must" in the statute cited above.¹⁴

On the surface, it might appear in this case as though, by inference at least, appellant waived the right to trial by jury when he stipulated to certain facts for the purpose of submitting an issue of law to the District Court upon consideration of the motion for judgment of acquittal. However, in doing so, appellant followed the standard practice in said court of limiting such stipulations of facts strictly to the de-

¹⁴The Territorial statute relied on, *i.e.*, Secs. 66-13-1 and 2, ACLA 1949, are part of the Code of Criminal Law and Procedure for the Territory of Alaska, enacted by the United States Congress on March 3, 1899 (13 Stat. 1253), which is applicable to all trials in courts of record in the Territory of Alaska. Separate provisions have been enacted for inferior courts by Title 69 of the Code, which is a recompilation of the Chapter entitled "Of Miscellaneous Provisions in Relations to Criminal Proceedings in Justice's Courts" which appear in the 1913 Code of Laws of Alaska. These latter provisions have been incorporated, in part, into the proceedings applicable to municipal magistrates, by virtue of statutory cross-references.

termination of the pending motion. If the motion is denied or held *sub curia*, the case then proceeds to trial in the ordinary course.¹⁵

Obviously, in the present case, the court did not have before it sufficient facts to make a determination or to support the one which resulted. It should be equally obvious, that waiver of such a fundamental constitutional right as the right to trial by jury must be accomplished by an affirmative act, not by inference. In the present case no opportunity was given the appellant to do anything, but to submit himself to summary verdict, sentence and judgment, as revealed by the record (*vide supra*). Such a procedure, appellant submits, is not consistent with "due process of law" as that term is interpreted in the federal courts.¹⁶

¹⁵See, e. g., *City of Anchorage v. John E. Anderson*, (DC 3d Div. Alaska, 1957), No. 3649 Cr., 17 Alaska (decided Sept. 19, 1957).

¹⁶See, e.g., Annotation in 75 L.ed. 200, 201; and cf. *In re Bruno Munro*, (*supra*, at p. 285).

CONCLUSION.

Based upon the reasons and the authorities stated above, appellant earnestly contends that the judgment of conviction below should be reversed and the cause remanded either with instructions to dismiss the complaint or to grant a trial *de novo* by jury.

Dated, San Francisco, California,
August 29, 1958.

Respectfully submitted,

EDGAR PAUL BOYKO,

Attorney for Appellant.

CHARLES E. TULIN,
BOYKO, TALBOT & TULIN,
Of Counsel.

(Appendices Follow.)

Appendices.



Appendix "A"

Chapter 38, SLA 1949

AN ACT to empower City Councils, pursuant to referendums, to levy sales taxes within their respective municipalities; and amending subsection Ninth of Sec. 16-1-35 ACLA 1949.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That subsection Ninth of Sec. 16-1-35 ACLA 1949 is hereby amended to read as follows:

Ninth: (a) GENERAL TAX FOR SCHOOL AND MUNICIPAL PURPOSES. To assess, levy, and collect a general tax for school and municipal purposes not to exceed two per centum of the assessed valuation upon all real and personal property and to enforce the collection of such lien by foreclosure, levy, distress and sale. Provided, however, that all property belonging to the municipality or the Territory, and the household furniture of the head of the family or a householder not exceeding Two Hundred Dollars (\$200.00) in value, as well as all property used exclusively for religious, educational, charitable purposes and the property of any organization, not organized for business purposes, whose membership is composed entirely of the veterans of any wars of the United States, or the property of the auxiliary of any such organization and all monies on deposit, shall be exempt from taxation. Provided, further, that if any

organization composed of veterans or its auxiliary derives any rentals or profits from any such property owned by it or them, such property shall not be exempt. Provided further, that the laws excepting certain property from levy and sale on execution shall not apply to taxes or to the collection of the same, or to any taxes levied by a municipal corporation.

(b) **CONSUMER'S SALES TAX.** To levy and collect a consumer's sales tax not exceeding two percentum of the sales price on all retail sales and services made within the municipality; provided, that the consent of the qualified voters of the municipality is first obtained through a referendum vote at a general or special election, upon ballots which clearly present the proposition as to whether such sales tax shall be authorized within the municipality. The ballot shall also set forth whether the tax is to be levied for general revenue for the municipality or for a special purpose, and, if for a special purpose, same shall be specified on the ballot. If fifty-five percent (55%) or more of the votes cast in said referendum are in the affirmative, the council may thereafter enact such a tax in the nature of a levy upon buyers but with imposition upon sellers of the obligation of collecting same at the time of sale or at time of collection with respect to credit transactions, and transmit same to the municipality. The sole purpose of this subsection is to enable cities, with the consent of the residents thereof, to impose sales taxes, and that although such method of taxation be established within a city, the

council may at any time abandon same. It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum.

Approved March 14, 1949.

Appendix "B"

Chapter 47, SLA 1951

AN ACT amending subsection Ninth of Sec. 16-1-35 ACLA 1949, as amended by Chapter 38 SLA 1949, pertaining to a general tax for school and municipal purposes.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That subsection Ninth of Sec. 16-1-35 ACLA 1949, as amended by Chapter 38 SLA 1949, is hereby amended to read as follows:

Ninth: (a) GENERAL TAX FOR SCHOOL AND MUNICIPAL PURPOSES. To assess, levy, and collect a general tax for school and municipal purposes not to exceed three per centum of the assessed valuation upon all real and personal property, and to enforce the collection of such lien by foreclosure, levy, distress and sale. Provided, however, that all property belonging to the municipality or the Territory, and the household furniture of the head of the family or a householder, not exceeding Two Hundred Dollars (\$200.00) in value, as well as all property used exclusively for religious, educational, charitable purposes and the property of any organization, not organized for business purposes, whose membership is composed entirely of veterans of any wars of the United States, or the property of the auxiliary of any such organization, and all monies on deposit, shall be exempt from taxation. Provided, further,

that if any organization composed of veterans or its auxiliary derives any rentals or profits from any such property owned by it or them, such property shall not be exempt. Provided further, that the laws excepting certain property from levy and sale on execution shall not apply to taxes or to the collection of the same, or to any taxes levied by a municipal corporation.

Approved March 21, 1951.

Appendix "C"

Chapter 121, SLA 1953

AN ACT to empower city councils to levy a general tax for school and municipal purposes, and to levy sales taxes within their respective municipalities; and amending subsection Ninth of Section 16-1-35 ACLA 1949, as amended by Chapter 47, Session Laws of Alaska, 1951, and validating sales taxes already collected, and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That subsection Ninth of Sec. 16-1-35* ACLA 1949 is hereby amended to read as follows:

Ninth: (a) GENERAL TAX FOR SCHOOL AND MUNICIPAL PURPOSES. To assess, levy, and collect a general tax for school and municipal purposes not to exceed three per centum of the assessed valuation upon all real and personal property, and to enforce the collection of such lien by foreclosure, levy, distress and sale. Provided, however, that all property belonging to the municipality or the Territory, and the household furniture of the head of the family or a householder, not exceeding Two Hundred Dollars (\$200.00) in value, as well as all property used exclusively for religious, educational, charitable purposes and the property of any organization, not organized

*Sec. 16-1-35, ACLA 1949: "Powers of Council. The council (of a city of the first class) shall have and exercise the following powers: * * * *Ninth:*

for business purposes, whose membership is composed entirely of the veterans of any wars of the United States, or the property of the auxiliary of any such organization and all monies on deposit, shall be exempt from taxation. Provided, further, that if any organization composed of veterans or its auxiliary derives any rentals or profits from any such property owned by it or them, such property shall not be exempt. Provided further, that the laws excepting certain property from levy and sale on execution shall not apply to taxes or to the collection of the same, or to any taxes levied by a municipal corporation.

(b) **CONSUMER'S SALES TAX.** To levy and collect a consumer's sales tax not exceeding two per centum of the sales price on all retail sales, rents and services, made within the municipality; provided that the consent of the qualified voters is first obtained through a referendum vote at a general or special election, upon ballots which clearly present the proposition as to whether such sales tax shall be authorized within the municipality. The ballot shall also set forth whether the tax is to be levied for general revenue for the municipality or for a special purpose, and, if for a special purpose, same shall be specified on the ballot. If a majority of the votes cast in said referendum are in the affirmative, the council may thereafter enact such tax in the nature of a levy upon buyers but with imposition upon sellers of the obligation of collecting same at the time of sale or at time of collection with respect to credit transactions, and

transmit same to the municipality. No such sales tax proposition shall be presented to the voters more than once in any twelve months. The sole purpose of this subsection is to enable cities, with the consent of the residents thereof, to impose sales taxes, and although such method of taxation be established within a city, the council may, at any time abandon same. It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum.

Section 2. All sales taxes heretofore levied and collected by municipalities within the Territory of Alaska, pursuant to ordinances which were valid at the time of their enactment, are hereby ratified and confirmed.

Section 3. (Emergency clause)

Approved March 30, 1953.